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No. 10,213

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Executor of the Last Will and Testament of ELISHA COBB MAYO, Deceased,
Respondent.

BRIEF FOR RESPONDENT.

EDWARD HALE JULIEN,
220 Bush Street, San Francisco,
Attorney for Respondent.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR RESPONDENT.

OPINION BELOW.

The only previous opinion in this case is that of the United States Board of Tax Appeals (R. 14-25) which is a memorandum opinion and, therefore, not officially reported.

JURISDICTION.

This petition for review (R. 26-29) involves estate tax in the amount of $5,971.61 and is taken from a decision of the Board of Tax Appeals that there was no deficiency, entered December 30, 1941 (R. 25-26). The case is brought to this Court on a petition for

review filed by the Commissioner of Internal Revenue on March 14, 1942 (R. 26-29) pursuant to the provisions of Sections 1141-1142 of the Internal Revenue Code.

QUESTION PRESENTED.

Whether testamentary gifts to admitted charities in remainder after an intervening $250 a month annuity chargeable against income for the life of decedent's aged sister are so uncertain as to not be allowable as a deduction of the value of the remainder interest to the charities from the gross estate under Section 303 (a) (3) of the Revenue Act of 1926, as amended.

One may note there was an alternative question presented to the Board, but respondent assumes for the purposes of this brief that petitioner on appeal has, by his slight reference to *Mead v. Welch,* 95 F. (2d) 617 (Opening Brief, p. 23) abandoned it. Regard, also, for legislative policy and intent, Section 408 (a), Revenue Act of 1942 amending Section 812 (d), Internal Revenue Code relating to the deduction for charitable bequests (Section 303 (a) (3)) here at issue.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved may be found in the Appendix, *infra,* pp. i-ii.

STATEMENT.

The facts, some of which were stipulated (R. 33-41) and as found by the Board of Tax Appeals (R. 14-20) are substantially as stated by Petitioner in his Opening Brief (pp. 3-8).

It would seem appropriate on brief, rather than on oral argument, inasmuch as the transcript of the proceedings before the Board are not in the Record on Appeal, to indicate that counsel for the parties stipulated (Board Transcript p. 18) in the event a computation under Board Rule 50 became necessary to ascertain the extent of the remainder interest going to the charities the applicable Treasury Regulations might be used (Reg. 80, Art. X). The Board found on the factual record the entire remainder interest was deductible, hence there was no need to point to this stipulation. Although no such issue is contemplated before this Court, one should observe that an amount much less than the entire remainder to the charities which would be definitely deductible under Section 303 (a) (3) of the Revenue Act of 1926, as amended, would still produce no estate tax. Therefore, out of an abundance of caution, respondent wishes to save the point.

As previously stated, Petitioner has substantially set forth the facts (Opening Brief pp. 3-8) in the case. However, one other compelling factual instance drew the attention of Judge Kern in regard to the mode of living of the sole annuitant of part of the income and the possibility of exercise of the power in the Trustee to disburse surplus income or corpus. The witness, Trust Officer administering the trust, was

asked on direct examination what, from his personal knowledge, Miss Rebecca Mayo's habits of life were:

"A. She lives alone in a little house which her brother gave to her. She lives with a housekeeper. Because of her impaired vision she never goes out, perhaps, once or twice a month to the bank or some place else to vote, or something of that kind. She lives very economically. She spent her whole life as a school teacher. Her only recreation is listening to a so-called talking-book machine and to the radio. She has no automobile.

Q. Does she go out on the streets alone?

A. Not now; not during the past year she has not.

The Member. What is a talking-book machine?

The Witness. They are records made at the Library of Congress in which a person reads a book into a recording machine transcribed on records, and then a person can play the record and then hear the book.

The Member. Oh, I see." (Board Tr. pp. 22-23.)

And later, after the same witness had testified no payments were made from the corpus of the trust or payments from income under the extraordinary power given the Trustee, except:

"Q. This talking-book machine was it purchased from the trust?

A. Yes, it was. It was purchased from the income account.

Q. And in addition to the $250 a month payments?

A. Yes. She was very reluctant to try it until we bought it ourselves from the trust.

Q. How much did that cost?

A. As I remember it, it was $65." (Board Tr. p. 25.)

SUMMARY OF ARGUMENT.

When the dominant facts in this case are brought to focus with the pertinent limitations in the Will of Elisha Cobb Mayo, the conclusion is convincing that here is a case in which an independent Trustee is more restricted in his powers of exercise in favor of the sole beneficiary of only part of the income of the trust than appeared in *Ithaca Trust Co. v. United States,* 279 U. S. 151. If this contention be at all tenable the cases upon which the Appellant must mainly rely are not apt as they are clearly distinguishable. *Gammons v. Hassett,* 121 F. (2d) 229 (C. C. A. 1st), certiorari denied, 314 U. S. 673, and *Field v. Commissioner,* 45 B.T.A. 270, reversed C.C.A. 1, *sub. nom. Commissioner v. Merchants National Bank of Boston, Executor,* December 30, 1942 (copies of opinion to counsel and Court about January 7, 1943).

Authorities which deal with an income tax statute on facts and limitations in living trust instruments which reserve to the grantor-beneficiary broad powers of control would seem to be irrelevant.

ARGUMENT.

SECTION 303 (a) (3) OF THE REVENUE ACT OF 1926, AS AMENDED, ALLOWS AS A DEDUCTION FROM THE GROSS ESTATE THE VALUE OF CHARITABLE REMAINDER INTERESTS AFTER AN INTERVENING LIFE ESTATE OR AN ANNUITY PAYABLE OUT OF INCOME MORE THAN SUFFICIENT TO PAY SUCH ANNUITY, AND WHERE THE TRUSTEE IS AUTHORIZED TO MAKE PAYMENTS FROM SURPLUS INCOME AND THEREAFTER FROM PRINCIPAL TO THE LIFE TENANT OR INCOME BENEFICIARY ONLY WHERE NECESSARY AND REASONABLE UNDER NECESSARY, UNUSUAL AND EXTRAORDINARY CIRCUMSTANCES SUCH AS ACCIDENTS OR ILLNESS.

The dominant facts are: There was one annuitant. Only part of the income was used to satisfy the sole obligation standing between the charitable remainders. When the testator died his sister, the annuitant, was, on that date about 79 years of age. She was virtually blind and beyond operative surgery or dietary treatment. Her life expectancy was short. Her habits of life were simple. She was frugal. One must be imaginative indeed to conceive a situation in her life thereafter which would "require" or find "necessary" the use of surplus income, much less the corpus. Rebecca S. Mayo died November 3, 1942. (Samuel O. Clark, Jr., Assistant Attorney General was so notified by this counsel, letter dated November 5, 1942.) The limitation upon the independent Trustee in the Will was as follows:

> "From the said trust property my aforesaid trustee shall pay the sum of Two Hundred Fifty ($250.00) dollars per month to my sister Rebecca S. Mayo, said payments to run from the date of my death, and in case she should, by reason of accident, illness, or other unusual circumstances

> so require, such additional sum or sums as in the judgment of said trustee may be necessary and reasonable under the existing conditions." (R. 16.)

The familiar test of deductibility was voiced by Mr. Justice Holmes in the *Ithaca Trust Co.* case, *supra,* at p. 154:

> "* * * The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion. The income of the estate at the death of the testator and even after debts and specific legacies had been paid was more than sufficient to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs."

It should be remembered that this reasoning of Mr. Justice Holmes was applied to a case where the testator gave the residue of his estate to his wife for life with authority to use from the principal any sum "that may be necessary to suitably maintain her in as much comfort as she now enjoys." There the widow was entitled to *all the income,* whereas, Miss Mayo was entitled to an annuity amounting to less than the actual income. The widow was to be maintained in "comfort". Miss Mayo had call upon the Trustee only for necessaries and extraordinary demands. "Comfort" is a subjective and expansive term, giving much latitude in the possibility of exercise of the power thereunder. Miss Mayo must objectively convince an

independent Trustee that her "* * * accident, illness, or other unusual circumstances so require(d)" and in the judgment of the Trustee found to be "* * * necessary and reasonable under the existing conditions." The Appellant in his Opening Brief, p. 2, under his "Question Presented" rather overstates his case when he says: "* * * despite the trustee's *unrestricted power* to invade the trust corpus * * *." (Emphasis supplied.) Again, in his "Index" p. (1), and at p. 10, under "Argument" he contends the amounts which go to charities are not ascertainable "* * * because of the trustee's *unrestricted* power to invade the corpus * * *". (Emphasis supplied.) A reader of Appellant's Brief may be, at outset, thrown off balance. Composed and tight thinking finds loose use of words disconcerting. If reference be needed on the restricted powers of the Mayo Trustee, see

Restatement of the Law of Trusts, Sections 128, 154, 157; and

Scott on Trusts, same sections, as expanded; also,

Civil Code of the State of California, Sections 863 and 2269;

Estate of Smith (1937), 23 Cal. App. (2d) 383, 73 P. (2d) 239;

Hartford-Connecticut Trust Co. v. Eaton (C.C. A. 2, 1929), 36 F. (2d) 710 (second hearing 1934, 8 F. Supp. 218).

Respondent has emphasized the strength of the instant case in relation to the *Ithaca Trust Co.* case, *supra,* to throw the Mayo facts and limitations of the

Will on the Trustee so that *Gammons v. Hassett, supra,* and *Field v. Commissioner, sub nom.* C.C.A. 1, *Commissioner v. Merchants National Bank of Boston, Executor, supra,* may be considered in proper relief.

Respondent contends that when the smoke of Appellant's other citations is cleared, reliance is placed upon the *Gammons* and *Field* cases. Justice Mahoney spoke for the majority of the First Circuit in both cases.

In the *Gammons* case the power to invade corpus was limited to "so much of the principal thereof *as my wife* may at *any* time and from time to time need or *desire,* to be paid to my said wife during her life." The taxpayer failed because of the disjunctive use of the word "desire". The majority said (at p. 231): "When the testator *gave his wife the power* to invade the principal *as she 'may * * * desire,'* he meant what he said. He intended to give her a broad power of invasion of the principal *not restricted* to a mere use of the corpus for the purpose of satisfying her needs." (Emphasis supplied.)

The Ithaca Trust Co. case was distinguished (at p. 233) in that: "It was not left to the widow's discretion." And the fifth sentence farther on in the opinion: "We know of no standard fixed in fact by which we could measure either the extent of the life tenant's desires or the likelihood of an exercise of those desires so that we could place a definite value on the charitable bequests." The Court was there comparing the *Ithaca Trust Co.* case with the case then at bar. Recall the word "comfort" was receiving construction

by Mr. Justice Holmes in the *Ithaca Trust Co.* case! It takes no herculean feat of the mind to mark the difference of the pertinent phrases in the *Mayo Will.*

The expansive and subjective qualities of the terms "comfort" and "desire" may convincingly be indicated in considering the *Field* case. Mark the contrast of the predominantly objective qualities of the term "needs" or an even more definite term "emergencies" or the phrase "illness, accident, or other unusual circumstances". The point is: The word "needs" correlates with "maintenance and support" cases. But "illness, accident, or other unusual circumstances" goes beyond and further limits the discretion or the existence of the power in the Trustee.

The First Circuit Court's decision in *Field v. Commissioner, supra,* would appear to pinion the case for the Appellant. Born of an early educational dislike for "paste and shears" briefs, the writer is none-theless impelled to quote extensively that Court's opinion: First, the limitation (p. 2): "* * * for the comfort, support, maintenance, *and/or happiness* of my said wife, * * * said Trustee shall exercise its discretion with *liberality to my said wife,* and consider her welfare, *comfort and happiness prior* to claims of residuary beneficiaries under this trust". (Emphasis supplied.) "Happiness" is the new word to receive construction. And with further unqualified "liberality". Note also "support" and "maintenance" are deleted from the phrase dealing with "liberality". Justice Mahoney reasons (pp. 5-7):

"* * * The decision in the instant case depends upon the proper interpretation of the language used in the testamentary trust, that is, whether or not there is present a possibility of invading the corpus of the trust in the sense that that phrase was used in *Gammons v. Hassett, supra.* The intention of the testator is to be found in the four corners of the will. His *language is to be literally interpreted* unless there is some ambiguity as to its meaning. Here the *testator clearly* stated that he sought to provide for the comfort, support, maintenance and/or *happiness* of his wife. It is, of course, true that it is difficult to define precisely what happiness means, but *happiness is essentially a subjective matter and must be left to an honest determination of the widow. The testator used both the conjunctive and disjunctive* showing clearly that he did not want the term 'happiness' to be considered as a catch-all. *It would be torturing the language used if we were to treat the word happiness as a mere superfluity.* If the widow should *desire* to provide permanently for the adopted children or for near relatives such a *desire* would be within the term 'happiness'. There is thus the *clear possibility (or probability)* that the corpus of the trust may be invaded.

"We recognize, as the respondent urges upon us, that there exist certain distinctions in the case before us and *Gammons v. Hassett, supra.* In that case the term *'desire'* was used, which may be said to be *somewhat broader than the term 'happiness'. There,* an invasion of the corpus of the trust *depended completely upon the will of the widow.* Here, there can only be an invasion of the corpus of the trust if in the sole discretion and wisdom of the trustee an invasion of the principal is

deemed necessary for the happiness of the widow. *But this can mean no more than that the widow must convince the trustee that* an invasion of the *corpus is necessary to her happiness. The testator,* out of abundant caution, in order to prevent any disagreement, *admonished the trustee to exercise its discretion with liberality.* Assuming then that she is able to convince the trustee that her happiness requires the expenditure of sums of money beyond the income and out of the corpus of the trust, the amount that would ultimately go to charity would *be uncertain. Since this possibility exists within the language of the trust instrument,* the case is *closer* to our decision in *Gammons v. Hassett, supra,* than it is to the *Ithaca Trust* case. The argument that under the facts in this case there is little likelihood that Mrs. Field will want to invade the corpus of the trust is similar to the argument advanced in *Gammons v. Hassett,* supra. We refused in that case to consider extrinsic evidence of a most persuasive nature. The widow was ninety-three years old, had been bedridden for years and had ample property of her own for her support. We said: 'While we grant that the likelihood of invasion of the principal was extremely remote at the testator's death, still the possibility of invasion did exist and, therefore, the amount of the property which would go to charity was uncertain'. (p. 233.)

"The respondent cites *First National Bank of Birmingham v. Snead,* 24 F. (2d) 186 (C.C.A. (5th) 1928); *Hartford-Connecticut Trust Co. v. Eaton,* 36 F. (2d) 710 (C.C.A. (2d) 1929); *Lucas v. Mercantile Trust Co.,* 43 F. (2d) 39 (C.C.A. (8th) 1930), and *Commissioner v. F. G. Bonfils*

> *Trust, supra,* as supporting its position. *These cases are clearly distinguishable.* The first three deal with *support and maintenance of the widow and clearly fall within the rule laid down* in the *Ithaca Trust* case. *The position which we take in the instant case is not at all inconsistent with those holdings.* * * *'' (Emphasis supplied.)

Can there be any doubt as to how the First Circuit would rule in the *Mayo* case? One is not unmindful of the words of Justice Magruder in his concurring opinion in *Gammons v. Hassett, supra,* p. 235: "But if he (testator) chooses to make the gift over contingent upon the non-exercise by the life tenant *of such a broad power* ('desire') as here conferred, *it does not seem unfair* to deny the deduction. The *Ithaca Trust* case must be considered as going to the *very verge* of the law, * * *''. Contrast the foregoing with how this concurring opinion starts out: "In my opinion the case at bar could be decided in favor of the taxpayer on a perfectly logical application—or perhaps extension—of the principle laid down in *Ithaca Trust Co. v. United States* (citation)''. One who sat at the feet of Justice Magruder in his professorial days may well wonder how much of an honestly intellectual, rather than a legalistic, nudge would have been necessary to cast him over the "verge" into a dissent in the *Gammons* case!

An interesting footnote to the *Field* decision is that Judge Kern, who wrote the opinion in the instant case (R. 20-26) was one of the four dissenters whose views were approved by the reversal against the tax-

payer in First Circuit. In a masterly piece of understatement Judge Kern said (R. 20): "If there is any material difference between the ultimate material facts in that (*Field*) case and the present proceedings it would seem to be in the present petitioner's favor". Again, (R. 21): "In the instant proceedings the trustee is *strictly limited* to a situation where 'by reason of accident, illness, or other unusual circumstances' the life beneficiary should 'require' sums in addition to the payment of $250 per month. The income from the trust corpus could reasonably be expected to provide sufficient cash for the $250 monthly payments to decedent's sister. During the years of the trust's existence the income thereof has been considerably in excess of the amounts necessary to make these payments. And, since decedent's sister has to date saved the greater part of her annuity payments, it seems *highly improbable* that 'accident, illness or other unusual circumstances' would *necessitate* the trustee delving into corpus *or even surplus income*". This was the reasoning of the Judge who found the facts.

Unless this Court can say as a matter of law the Board's conclusion from the facts found are clearly erroneous, its determination should stand. *California Barrel Co. Inc. v. Commissioner* (C.C.A. 9, 1936), 81 F. (2d) 190.

On the particular facts in this case and the appropriate decisions under the applicable estate tax law, counsel for taxpayer harkens to ever so faint a whisper of admonition from the epigrammatic father of the

present majority on the United States Supreme Court, Mr. Justice Holmes, in *Corliss v. Bowers,* 281 U. S. 376 at 378: "* * * taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed—the actual benefit for which the tax is paid". In the multiplicity of legalistic tax opinions of the years between, one may ponder how complete the reversal by Holmes' pupils of his juristic philosophy when they heed the promptings of government counsel in decisions which stem from arguments directed at "refinements of title". In this vein, renewed and wholesome respect for the sound and practical good sense of another member of the old court is engendered in reading again an opinion bottomed on human fact, not professorial fancy. See, Mr. Justice Sutherland in *United States v. Provident Trust Co.,* 291 U. S. 272. Compare, *Helvering v. Hallock,* 309 U. S. 106; *Helvering v. Horst,* 311 U. S. 112; *The State Tax Commissioner of Utah v. Aldrich,* 316 U. S. 174. As one capable lawyer, in a moment of kindly levity, said: "After the *Horst* case, anything can happen". And, in *Utah v. Aldrich* even that pleasing plugger of the loopholes of 1937 could not stomach the philosophy or reasoning of the majority, so he registered his dissent—Mr. Justice Jackson.

To conclude respondent's direct argument on a note of deadly seriousness. In order to sustain appellant on any theory thus far urged, and on germane authority, facts must be found to show Rebecca S. Mayo could draw upon the corpus of this testamentary trust virtually *at will.* It must be further convincingly

shown that there existed *in* Rebecca S. Mayo a power to diminish the principal of the trust estate. Those were the conditions which rendered the amounts of deductions uncertain in the *Gammons* and *Field* cases. Not so here. On brief of this case for Board Member (now Judge) Kern, the writer urged that taxation was a practical matter. There can be no practical question on the facts of the *Mayo* case that these worthy charities, notably the American National Red Cross, will take the full remainder of this estate upon the death of Rebecca S. Mayo. It would be a travesty not only on common sense, but of the decisional and legislative law, to hold that on the date of decedent's death in August of 1937 there was any "* * * uncertainty appreciably greater than the general uncertainty that attends human affairs", that these recognized charities would take their full remainder interest.

Of course, neither the advocate nor Judge would lay claim to clairvoyance, but today we know the charities do take their full remainder interests (plus accumulation of income not appropriated to the payment of the $3000 annuity). Was it any less certain on these facts on the date of Elisha Cobb Mayo's death?

ANSWER TO APPELLANT'S ARGUMENT.

In the round, cases classify on the issue in this case into:

Conditions precedent: *Burdick v. Commissioner,* 117 Fed. (2d) 972, certiorari denied 314 U. S. 641 (there,

charities would take only upon the action of a sister and nephew under a power which they were free to exercise or not).

Contingent: *Humes v. United States,* 276 U. S. 487 (the charity would take only if "this Texas girl of fifteen will not marry, or if she does, will die without issue before age of thirty or thirty-five, or forty"); *Helvering v. The Union Trust Company, etc.* (*Estate of Carolyn G. Caughey*), 125 Fed. (2d) 401, certiorari denied 62 S. Ct. 1292 (where the remainder interests were to pass to a non-charitable organization should the Girl Scouts fail to use the other real estate in the manner directed); *Pennsylvania Co. for Insurances, Etc. v. Brown,* 6 F. Supp. 582, affirmed *per curiam,* 70 F. (2d) 269.

Diversion by the beneficiary: *Knoernschild v. Commissioner,* 97 F. (2d) 213 (daughter given the right to direct the trustee to pay any part of the fund as her judgment saw fit to mother or any of her brothers or sisters in case they were in need of "financial assistance". The Court observed the quoted phrase was broad enough to "include a vast sum to retire a mortgage bond issue upon which there was a default to prevent foreclosure". Even embrace "financial aid such as loss by speculation, gambling, unwise investment, etc.").

"Desire" or "happiness" of beneficiary: *Gammons* and *Field* cases, *supra.*

"Needs" or "maintenance and support" of life tenant or beneficiary: *Ithaca Trust Co. v. United*

States, supra; First National Bank of Birmingham v. Snead, 24 F. (2d) 186; *Lucas v. Mercantile Trust Co.,* 43 F. (2d) 39; *Millard v. Humphrey,* 79 F. (2d) 107.

Emergencies or "accident, illness, or other unusual circumstances": *The Estate of Elisha Cobb Mayo,* at bar.

The foregoing classification of cases and their separate categories are recognized by courts as being quite distinct on their facts and for purposes of decision under Section 303 (a) (3) of the Revenue Act of 1926, as amended.

It would seem to properly follow that respondent in answer to argument of appellant should touch but lightly on the vaguely analogous cases arising under the unrelated income tax statutes dealing with broad powers reserved in a settlor-beneficiary, sometimes denominated "controlled trusts". See, *Jacob Mertens, Jr., The Law of Federal Income Taxation* (December 1942), Chapters 36 and 37 at Sections 36.68 and 37.03, *et seq.* Appellant's discussion of cases dealing with the "existence of the power (in the beneficiary) rather than the likelihood of its use" are completely off the point. No power existed in Miss Mayo and the power which existed in the Trustee was more restricted in scope than any case which, it would seem, has thus far reached the Courts. Even income tax cases, which we contend is very wide of fitting analogy to the case at bar, assist the construction which respondent here urges. See, reasoning of the Court in *Commissioner v. F. G. Bonfils Trust,* 115 F. (2d) 788.

Coming directly to the opening brief of appellant, it may be said that of the twenty-one cases cited, twelve are income tax cases to considerable extent irrelevant. Of the remaining nine cases dealing with estate tax and the applicable statute before us, only three of them are even close. Of those three the *Gammons* and *Field* cases, supra, involved the construction of subjective terms depending almost wholly upon the personal feelings, or perhaps caprice, of the beneficiary. The decision in *Ithaca Trust Co. v. United States, supra,* may fairly be said to relate largely to maintenance and support cases. We think and contend that maintenance and support provisions have more facets of a subjective character and implications less objective than the terms of the phrase here under construction "accident, illness, or other unusual circumstances".

But, at very outset and thereafter with profusion, appellant uses inept expressions, a few of which follow: "trustee's unrestricted power" (App. Op. Brief, pp. (1), 2); "* * * it could not be said with *absolute assurance* * * *" (p. 9); "* * * one could (not) *predict* that the corpus would *never be invaded*" (p. 9); "the trustee *might* invade the corpus" (p. 12); "it could not be said with absolute assurance * * *" (p. 13); "the trustee *might* have been obliged" (p. 14); "This leaves the *door wide open* to additional payments so that it would be *pure speculation* * * *" (p. 14); "there was a *distinct possibility* that substantial sums might have to be spent * * *" (p. 21); "* * * of such *broad powers* as we have here * * *" (p. 23).

Small wonder, when the careful use of words and their meaning is so important, anyone's head may be made, by the foregoing, to spin to a condition of dizziness. On regaining equanimity one may reflect there are no absolutes in the science of the law. Nor, indeed, is there room for extravagant use of language even in the flush of advocacy.

In all fairness to our opponent we do perceive the artificial heart of his case amid the confusion of words. At page 16, he says: "But cases of this type must be governed by the existence of the power rather than the likelihood of its use, as shown by extrinsic circumstances, varying, of course, in each particular case". The vice of this proposition, assuming, *arguendo,* the test itself were sound, is twofold: First, the existence of the power *does* vary under the facts of each case. The limitation in the trust instrument is but one fact or circumstance to be considered. Second, no such power existed in Rebecca S. Mayo.

Again, at page 21, petitioner states: "* * * the test to be applied in cases of this sort is the *existence* of the power or the *possibility* of invasion of the corpus, not the likelihood of its exercise". His authority for the statement is predicated on the decision in the *Gammons* case, *supra.* Out of context and the facts of that case this expression has the appearance of vitality. When attempt is made to bring it into balance with the instant case its weight is nil.

In conclusion, beginning on page 18 of petitioner's Opening Brief, he launches upon the purported anal-

ogy of income tax cases. He first quotes *Bank of America National Trust and Savings Association v. Commissioner,* 126 F. (2d) 48, the majority opinion having been written by Mr. Justice Denman of this Court. Anything this brief writer might say toward pointing the obvious distinctions between the case now before the Court and the cited case, would seem only to add to the labor of this Court. Of the remaining income tax cases cited by appellant we hazard a similar position.

Likewise, we have not pressed the point of the policy of the tax law and presumptions favorable to charitable deductions, for ample direct authority and more creditable principle is with us.

CONCLUSION.

The decision of the Board of Tax Appeals is right and should, therefore, be affirmed.

Dated, San Francisco,
January 27, 1943.

Respectfully submitted,
EDWARD HALE JULIEN,
Attorney for Respondent.

(Appendix Follows.)

Appendix.

Appendix

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 303 [as amended by Sec. 403 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680]. For the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * * * *

(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * *.

Treasury Regulations 80 (1937 Ed.):

ART. 44. *Transfers for public, charitable, religious, etc., uses.*—* * *

If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * *

* * * * * * *

ART. 47. *Conditional bequests.*—If the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the per-

formance of the act or the occurrence of the event shall have taken place before the deduction can be allowed.

If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

The provisions of Articles 44 and 47 of Treasury Regulations 80 (1934 Ed.) are identical with the above quoted provisions.